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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

ERNEST R. CUMMINGS, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.
Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER ERNEST R. CUMMINGS

GABRIELLE GULYASSY KINKELA*
VICTOR J. GULYASSY
ROBERT V. KINKELA
GULYASSY, KINKELA & KINKELA
6461 Pearl Road, Suite One
Parma Heights, Ohio 44130
216-842-1313
Counsel for Petitioner,
Ernest R. Cummings

BEST AVAILABLE COPY

*Counsel of Record

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INTRODUCTION

Respondents urge this Court to permit a decision to stand that would absolve the Postal Service of its statutory obligation to compensate letter carriers for time worked during meal periods.

If such an unjust result were to be allowed, this Court's construction of the Fair Labor Standards Act would be uprooted, creating inestimable upheaval. The decision of the Sixth Circuit Court of Appeals negates the concept of work time even as understood in the common human experience. It would generate endless disputes, with no reasonable hope of resolution. It would allow employers to claim all of an employee's time while compensating him for only part of it. Such employment practices have long been repugnant to Congress and to this Court.

I. LUNCH PERIOD TIME THAT IS DIRECTED AND CONTROLLED BY THE POSTAL SERVICE FOR ITS BENEFIT IS COMPENSABLE UNDER THE FAIR LABOR STANDARDS ACT.

Respondents contend there is no reason for further review of this essentially fact-bound case. (Resp. 6.) By characterizing this as a fact-bound case, respondents have gone to the center of petitioner's cause. Had the Sixth Circuit's decision been truly bound to determinative facts, and had those facts been construed in accord with applicable law, petitioner's claim would have been granted.

The elements of work time have been definitively established by this Court. Tennessee Coal Co. v. Muscoda Local, 321 U.S. 590, 64 S.Ct. 698, 88 L.Ed. 949 (1944), Armour & Co. v. Wantock, 323 U.S. 126, 65 S Ct. 165, 89 L.Ed. 118 (1944), Skidmore v. Swift & Co., 323 U.S. 134, 65 S.Ct. 161, 89 L.Ed. 124 (1944). They are extraordinarily visible in the facts of this case.

Petitioner's lunch period begins when he enters his vehicle, after making his last pre lunch delivery. From that moment, and for each other moment of the lunch period, the Postal Service exercises its direction and control over petitioner, for its benefit.

Upon entering his vehicle, at the commencement of his lunch period, petitioner is under orders to follow lines of travel dictated by the Postal Service. He must follow these lines of travel to a place authorized by the Postal Service, and is under orders forbidding him from going elsewhere. He is not permitted to select his lunch place. He is only allowed to submit suggestions. The Postal Service must then give its authorization, and reserves the right to reject any suggestion that is not in keeping with its needs.

At the time his lunch period commences, and continuing for the entire meal period,

petitioner has with him all accountable items, and all undelivered United States mail entrusted to his care. He is under orders requiring him to remain responsible and accountable for mail security, because he is not relieved of these obligations until he makes an accounting to the Postal Service at the end of his work day.

After eating, petitioner must reach his next point of delivery by the time set as the conclusion of his lunch period. During this last portion of his meal period, petitioner is under orders to arrive at that point by following lines of travel dictated by the Postal Service.

Throughout his meal period, petitioner is subject to supervision. This is to insure that orders are being obeyed. In this way, the Postal Service insures there is no interruption in its direction and control over petitioner. Its overriding need to protect the sanctity and security of the mail requires

petitioner's immediate availability at any given moment he is on duty, including his lunch period. Throughout this time, petitioner also remains under orders to provide courteous service to the public, as requested.

Thus, during every moment of petitioner's lunch period, he is under Postal Service orders, has continuing responsibility and accountability for mail security, is liable to be called upon at any moment, and is not at liberty to go away. Armour and Co. v. Wantock, supra.

Respondents contend that the Sixth Circuit's decision is fully supported by Tennessee Coal Co. v. Muscoda Local, Armour and Co. v. Wantock and Skidmore v. Swift & Co., supra, and by the Code of Federal Regulations.

This argument is untenable, because the decision of the court below was not in reliance on FLSA standards, but on a substantial duties standard. As petitioner has previously shown, (Pet. 14-17 and 30-32), substantial duties means the performance

of physical labor.

Under the FLSA, compensation has never been contingent upon the performance of physical labor. Tennessee Coal, and its progeny, unequivocally repudiate such a requirement. Hours worked are not limited to time spent in active labor, but include time given by the employee to the employer. Armour & Co. v. Wantock and Skidmore v. Swift & Co., supra.

Beginning with Tennessee Coal, and with additional clarification thereafter, in Armour and Skidmore, this Court identified the employer's control and requirements as determinative elements of work time. Fundamental to the concept of direction and control, is the resulting restrictive effect on the employees' free disposition of time as they see fit. It was in reliance on these FLSA principles that the Sixth Circuit Court of Appeals decided F. W. Stock & Sons v. Thompson, 194 F.2d 493 (1952). The standard, enunciated so clearly therein, is that a meal

period is compensable, unless it is free time, during which the employee is free to serve his own interests and do as he pleases.

In deciding petitioner's claim, the Sixth Circuit abandoned that standard, together with this Court's precedent upon which it has previously relied.

Respondents have demonstrated they do not understand the FLSA by arguing that this Court has recognized that Section 7(a) generally does not require compensation for eating and sleeping periods. First, 29 U.S.C. 207(a) does not set a standard for determining work time, but provides for computation of overtime on the basis of a forty hour work week. The method of computing overtime is not at issue. Second, this Court has not established a general rule excluding meal periods from compensable time, as respondents erroneously allege.

Armour and Skidmore stand for the proposition that inactive duty may be duty

nonetheless where the employees are under orders, liable to be called upon at any moment, and not at liberty to go away. Hours worked are not limited to time spent in active duty, but include time given by the employee to the employer. In Armour, meal time was not at issue. In Skidmore, there was an arrangement between the employer and the employees, and the employees were on duty 24 hours or more. Under those particular circumstances, meal and sleep periods may be excluded.

The above decisions are codified at 29 C.F.R. 785.22 which requires compensation for meal and sleep time of employees who are on duty 24 hours or more, unless there is a contrary arrangement to which the employee has agreed. Where there is an agreement, no more than 8 hours may be excluded.

Where employees are on duty less than 24 hours, 29 C.F.R. 785.19 requires compensation for meal periods unless the employee is completely relieved from duty, whether

active or inactive. This is a codification of judicial construction of the Act, including F.W. Stock & Sons v. Thompson, supra, which, in turn, was decided in reliance on Armour and Skidmore. Additionally, employees on duty less than 24 hours are working, even though permitted to sleep or engage in other personal activities when not busy. 29 C.F.R. 785.21.

Thus, both this Court, and the Regulations iterating the inactive duty standard, flatly contradict respondents' claim of a general rule excluding meal periods from compensable time.

This Court has cautioned that words of its opinions are to be read in light of the facts of the case. Armour & Co. v. Wantock, supra. Respondents have disregarded these instructions by attempting to superimpose an exclusion, permissible only under the specific 24 hour duty circumstances present in Skidmore, on the facts of this case.

However, petitioner is on duty 8-1/2 hours, not 24 hours. His meal period cannot be

excluded from compensable time, because he is not relieved of duty,but continues to serve his employer's interests.

Respondents also refer to a writing by the Department of Labor, portions of which are included in the opinion of the court below. (Pet.App. 13a-15a.) Respondents characterize it as the DOL's interpretation of its Regulations. This is an erroneous representation.

The DOL's duties are not to be confused with the authority of the courts to interpret the Act by reaching conclusions of law, based on findings of fact. Skidmore v. Swift & Co., supra. The DOL codifies said pronouncements of this Court at 29 C.F.R. 785.2, which states that ultimate decisions on interpretations of the Act are made by the courts. Thus, the administrator may only determine the position he will take if the courts have not already spoken.

The regulations set forth in the

preceding paragraphs summarize relevant FLSA standards that are the result of judicial construction. Once that has been accomplished, the interpretation has been made for the DOL, and its duty is to enforce compliance.

This case does not present any unsettled questions of law. The official position of the DOL must necessarily be that which the courts have already established. This means lunch periods are compensable under the FLSA unless the employee is completely relieved of duty, whether active or inactive. 29 C.F.R. 785.19. The law does not say partially, or substantially relieved of duty, but completely. Likewise, to insure there is no confusion, inactive duty is specifically identified. That does not, and cannot, give rise to the "substantial duties" standard relied on by the court below.

Where the words and their meaning are as clear and unambiguous as they are in 29 C.F.R.

785.19, there is no cause for further interpretation, and no excuse for conjecture.

As petitioner has already demonstrated (Pet. 26, 27), to the extent that any DOL utterances are inconsistent with 29 C.F.R. 785.19, or are conjectural, they are not entitled to any credence whatsoever. Skidmore v. Swift & Co., supra, and Jewell Ridge Coal Corp. v. Local, 325 U.S. 161, 65 S.Ct. 1063, 89 L.Ed. 1534 (1945).

Nevertheless, the court below included such conjecture in its opinion. By the Sixth Circuit's own admission, the DOL writing it quoted is of less than marginal import. It was a response to a one-sentence inquiry. Curiously, and uncharacteristically, the DOL ventured a reply in a vacuum. Instead of adhering to judicial construction, as it was obligated to do, the DOL resorted to conjecture.

Other events, that were transpiring about the same time as the DOL evidenced its above

confusion, provide some insight. The DOL usually demonstrates single-mindedness in enforcing the FLSA. At least it does so with private sector employees. However, it has ambivalent feelings where another federal agency is involved, because it perceives itself as wearing "two hats." Donovan v. United States Postal Service, 530 F.Supp. 894 (D.C.D.C. 1981). Where the Postal Service is involved, the DOL feels responsible to the agency, not just to its employees. Under such circumstances, the DOL experiences conflicts that interfere with its usual steady course. Donovan v. United States Postal Service, supra.

II. THE FAIR LABOR STANDARDS ACT REQUIRES COMPENSATION FOR LUNCH PERIODS DURING WHICH PETITIONER IS SUBJECT TO DISCIPLINARY ACTION FOR FAILURE TO OBEY POSTAL SERVICE ORDERS REGULATING THOSE EMPLOYMENT OBLIGATIONS WHICH CONTINUE THROUGHOUT HIS MEAL PERIOD.

Respondents admit that petitioner is subject to discipline for failure to secure mail in postal vehicles and relay boxes prior to

lunch and for failure to exercise reasonable care for the items in his possession. (Resp.3.) This admission is preceded by two conflicting statements. On the one hand, respondents assert petitioner is responsible for the security of mail during lunch. (Resp. 2.) On the other hand, they allege this responsibility is discharged prior to lunch. (Resp. 3.)

The fact is petitioner cannot discharge these obligations prior to lunch, because the mail and all accountable items stay with him, in his vehicle and on his person. It is for this reason the Postal Service holds petitioner responsible and accountable, under penalty of disciplinary action, until it relieves him of these obligations at the end of his work day.

Respondents omit mentioning that petitioner is also subject to disciplinary action if he does not obey orders requiring him to remain immediately available to the Postal

Service throughout the meal period. This means he must follow authorized lines of travel, and must remain confined at an authorized place.

Respondents also carefully avoid any reference to the fact that if the Postal Service did not continue to make use of petitioner's services, for its benefit, during the meal period, there would be no need to utilize discipline to insure that Postal Service requirements were being satisfied in compliance with its dictates. In turn, discovery of infractions of the multiple Postal Service orders petitioner is compelled to obey throughout his meal period, could not be accomplished unless he remains subject to supervision during that time. (Pet. 10-12) Most significantly, respondents have failed to reconcile these circumstances with the freedom from employment obligations which the FLSA requires during uncompensated meal periods.

This Court has long recognized that disciplinary action is inherent to the element of control. Jewell Ridge Coal Corp. v. Local, supra. Indeed, it is impossible to conceive of any circumstance that would be more compelling proof of work time. Petitioner cannot be subject to disciplinary action during meal periods,for failure to obey orders regulating employment obligations that continue throughout that time, without it being recognized as compensable work time.

To paraphrase the Court in F. W. Stock & Sons v. Thompson, supra, a letter carrier who has to eat lunch while continuing to be held responsible and accountable for the security of United States mail, under threat of disciplinary action, is not having a free lunch period. A letter carrier who is under orders, during lunch, requiring him to be immediately available to the Postal Service, under threat of disciplinary action, is not free to do as he pleases.

III. 39 U.S.C. SECTION 410(a) SPECIFICALLY EXCLUDED THE POSTAL SERVICE FROM THE FEDERAL EMPLOYEES PAY ACT.

Respondents argue that reliance on Federal Employees Pay Act precedent was clearly proper in the present case. (Resp. 7)

However, no argument can overcome twice told intent of Congress. The Postal Reorganization Act of 1970 specifically excluded the Postal Service from the Federal Employees Pay Act. 39 U.S.C. Section 410(a). The 1974 amentments to the FLSA specifically include the Postal Service. 29 U.S.C. Section 203 (e)(2)(B). Congress could not have spoken in any clearer terms.

Therefore, the Pay Act has no applicability to petitioner. It has been superseded by the FLSA, even as to those employees to whom it once applied. The court of claims duly acknowledged the demise of the Pay Act, and the standards that went with it, in Beebe v. United States, 640 F.2d 1283 (Ct.Cl. 1981) It cannot

be resurrected for this or any other FLSA claim.

Additionally, the Pay Act's substantial duties standard, requiring the performance of physical labor, has never been a prerequisite to recovery under the FLSA.

The Pay Act has long been set to rest. It was disposed of accordingly in the Petition (28-35), and requires no further comment.

CONCLUSION

Respondents' arguments have not diminished the magnitude of the error at issue.

The decision of the Sixth Circuit Court of Appeals defeats the entire pattern and purpose of the Fair Labor Standards Act. It would create extraordinarily vexatious problems in an area of the law that is too well settled to countenance such a grievous disruption.

Therefore, petitioner respectfully requests this Court to preserve the uniform construction and application of the Fair Labor Standards Act by granting certiorari.

Respectfully submitted,

GABRIELLE GULYASSY KINKELA*
VICTOR J. GULYASSY
ROBERT V. KINKELA
GULYASSY, KINKELA & KINKELA
6461 Pearl Road, Suite One
Parma Heights, Ohio 44130
216-842-1313
Counsel for Petitioner,
Ernest R. Cummings

*Counsel of Record
Dated: August 26, 1985